IN THE COURT OF CRIMINAL APPEALS
OF TEXAS

NO. WR-81,574-02

EX PARTE ARELI ESCOBAR, Applicant

ON APPLICATION FOR WRIT OF HABEAS CORPUS
CAUSE NO. D-1-DC-09-301250 IN THE 167TH JUDICIAL DISTRICT COURT
TRAVIS COUNTY

***Per curiam*.**

O R D E R

This is a subsequent application for a writ of habeas corpus filed pursuant to the provisions of Texas Code of Criminal Procedure Article 11.071, § 5.[1]

Applicant was convicted of murdering seventeen-year-old Bianca Maldonado Hernandez in the course of committing or attempting to commit aggravated sexual assault. TEX. PENAL CODE § 19.03(a)(2). Bianca, who shared an apartment with her mother, sister,

[1] Unless otherwise indicated, all references to Articles are to the Texas Code of Criminal Procedure.

and her infant son, lived in the same apartment complex as Applicant. At around 3:00 a.m. on the morning of May 31, 2009, Bianca's mother and sister left their apartment to deliver newspapers. When they returned around 7:00 a.m., they discovered that Bianca was dead. Her partially nude body was lying face-down on the floor of her living room next to her son, who was alive but covered in blood and motionless. Bianca had been beaten and stabbed over forty times. The medical examiner who conducted her autopsy concluded that Bianca also suffered injuries as a result of a large, hard object, not consistent with a male sexual organ, being forcefully inserted into her vagina and anus.

The State presented evidence that Applicant was at his apartment with friends and relatives around 2:00 a.m. on the date of the offense. Witnesses testified that Applicant did not appear to be injured at that time. Applicant's girlfriend, Zoe Moreno, testified that Applicant went outside the apartment at some point and did not return. Zoe left the apartment and attempted to call Applicant's cell phone several times as she drove home. On her fourth attempt, at around 4:12 a.m., Zoe's call went through and she heard moaning, grunting, and a female screaming, which led her to believe that Applicant was having sex with someone. Phone records indicated that this call "hit" a cellular tower close to the apartment complex where the offense occurred.

Between 5:00 and 5:30 a.m., Applicant drove his sister Nancy's rented Mazda vehicle to his mother's apartment. He was injured and was wearing bloody clothing, and he told his mother that he had been in a fight. He changed his clothes and went to see Nancy's

boyfriend, "Tano," around 7:00 a.m. Applicant initially told Tano that he had "fucked up some woman," but he later changed his story and said that he had a fight with "some asshole." Tano texted Nancy and said Applicant told him that he had "f-ed up" and that some girl's blood was on his clothes. Applicant later told another sister that he had sex with a girl early that morning, but he denied hurting the girl. Applicant was arrested at his mother's apartment on June 2, 2009, after Zoe made an anonymous call to Crime Stoppers and her son called the police.

DNA evidence was analyzed by the Austin Police Department (APD) DNA Lab and Fairfax Identity Laboratories. The evidence at trial showed that Bianca could not be excluded as a contributor to multiple mixed-source DNA samples from the shoes and clothing Applicant wore and the Mazda vehicle he drove on the date of the offense. Applicant could not be excluded as a contributor to a mixed-source DNA sample from the doorknob lock of Bianca's interior front door. In addition, Bianca's DNA profile was consistent with two single-source DNA samples from Applicant's shoes.

The State also presented evidence that Applicant's shoe could not be excluded as a possible contributor to a shoe print found at the crime scene. In addition, a latent print on a lotion bottle near Bianca's body was identified to the ring finger of Applicant's left hand.

A jury found Applicant guilty of the offense of capital murder in May 2011. At punishment, the jury answered the special issues submitted pursuant to Texas Code of Criminal Procedure Article 37.071, and the trial court, accordingly, set Applicant's

punishment at death. This Court affirmed Applicant's conviction and sentence on direct appeal. *Escobar v. State,* No. AP-76,571 (Tex. Crim. App. Nov. 20, 2013)(not designated for publication). This Court denied relief on Applicant's initial post-conviction application for a writ of habeas corpus. *Ex parte Escobar,* No. WR-81,574-01 (Tex. Crim. App. Feb. 24, 2016)(not designated for publication).

On February 10, 2017, Applicant filed in the trial court this subsequent application for a writ of habeas corpus. Applicant presents six claims in this application in which he challenges the validity of his conviction and resulting sentence. In October 2017, we held that Applicant "satisfie[d] the requirements of Article 11.071, § 5(a)" for some of his claims. Therefore, we remanded this application for the trial court to consider Applicant's claims that: he is entitled to relief under Article 11.073 "because new scientific evidence reveals that the State relied on scientifically unreliable and false DNA evidence to secure [his] conviction" (Claim One); his "right to due process was violated by the State's presentation of unreliable, misleading and false DNA testimony during the guilt phase of trial" (Claim Two); the State violated *Brady*[2] by "failing to disclose materials that significantly undermined the reliability and validity of the DNA evidence" (Claim Three); and he is entitled to relief under Article 11.073 "because new scientific evidence reveals that the State relied on scientifically unreliable fingerprint identification evidence to secure [his] conviction" (Claim Four). We also ordered the trial court to consider "that portion of [Claim

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[2] *Brady v. Maryland,* 373 U.S. 83 (1963).

Six] in which [A]pplicant asserts that the State violated his right to due process by present[ing] misleading testimony about his proximity to the murder scene based on cell-tower location information[.]" After holding a hearing on these claims, the trial court signed findings of fact and conclusions of law recommending that relief be granted on Claims One and Two. We disagree.

In Claim One, Applicant contends that he is entitled to relief under Article 11.073 because the DNA evidence presented at his trial has been invalidated by: (1) "scientific developments in DNA mixture interpretation protocols" in 2015, and (2) the discovery of "systemic flaws" in the APD DNA Lab's operations when the Texas Forensic Science Commission (TFSC) audited the lab in 2016.

Article 11.073 provides that an applicant is entitled to post-conviction writ relief if he can prove that:

> (1) Relevant scientific evidence is currently available and was not available at the time of the convicted person's trial because the evidence was not ascertainable through the exercise of reasonable diligence by the convicted person before the date of or during the convicted person's trial;
>
> (2) The scientific evidence would be admissible under the Texas Rules of Evidence at a trial held on the date of the application; and
>
> (3) The court must make findings of the foregoing and also find that, had the scientific evidence been presented at trial, on the preponderance of the evidence the person would not have been convicted.

Art. 11.073(b)(1) & (2). When assessing reasonable diligence, "the court shall consider whether the field of scientific knowledge, a testifying expert's scientific knowledge, or a

scientific method on which the relevant scientific evidence is based" has changed since the date of trial (for a determination with respect to an original application) or the date upon which a previous application was filed (for a determination made with respect to a subsequent application). Art. 11.073(d).

Applicant has failed to meet these requirements. The State has presented updated DNA statistics from Dr. Bruce Budowle and Mitotyping Technologies that have been recalculated under current standards. When Budowle and Mitotyping reviewed the DNA findings from APD and Fairfax, they concluded that some of the mixed-source samples were inconclusive or inadequate for comparison. However, they concluded that Bianca was still included as a contributor to other mixed-source samples, and her DNA profile was still consistent with the single-source samples in this case. Therefore, the recalculated results continue to show that Bianca's DNA was at least on Applicant's shoes and in the Mazda.

The trial court finds that the "evidence handling issues" discovered in the TFSC audit render all of the DNA samples that were "collected, processed, and stored" by the APD DNA Lab unreliable, and the "downstream effects of APD's evidence handling issues" make all of the subsequent DNA analysis unreliable as well. Applicant, however, has failed to show that the general deficiencies discovered in the TFSC audit specifically affected the DNA results in his particular case. Even if the recalculated statistics and the evidence undermining the reliability of the DNA samples had been presented at trial, Applicant has not shown that "on the preponderance of the evidence [he] would not have been convicted." Art.

11.073(b)(2). The State presented other evidence to support Applicant's conviction for capital murder, including the latent print on the lotion bottle, the cell phone evidence, the shoe print, Zoe's testimony, and Applicant's statements and appearance after the offense.

With regard to Claim Two, Applicant must show by a preponderance of the evidence that (1) false evidence was presented at his trial and (2) the false evidence was material to the jury's verdict. *Ex parte Weinstein,* 421 S.W.3d 656, 665 (Tex. Crim. App. 2014). We review factual findings concerning whether a witness's testimony is false under a deferential standard, but we review *de novo* the ultimate legal conclusion of whether such testimony was "material." *Id.* at 664. False testimony is "material" only if there is a "reasonable likelihood" that it affected the judgment of the jury. *Id.* at 665.

Applicant alleges in Claim Two that the recalculated DNA results show that Elizabeth Morris, a DNA analyst at the APD DNA Lab, and Marisa Roe, a DNA analyst at Fairfax Identity Laboratories, falsely testified about the DNA results at trial.[3] He also contends that the TFSC audit proves that Dr. Mitchell Holland, an expert witness in the field of DNA analysis, and Morris "gave the jury the false impression that because APD was an accredited laboratory, the lab followed accepted scientific methods." Applicant cannot show that this evidence is material because the recalculated statistics for some of the DNA samples are still incriminating to Applicant. The State also relied on: Zoe's testimony; eyewitness accounts of Applicant's statements and appearance after the offense; and cell phone, fingerprint, and

[3] At the time of Applicant's trial, Roe's last name was Fahrner.

shoe print evidence linking Applicant to the murder. Due to the combined strength of this evidence, Applicant has failed to show a reasonable likelihood that the challenged testimony affected the jury's judgment.

The trial court found no merit to the rest of Applicant's remanded claims. We agree. Applicant's *Brady* claim fails because he has not met his burden to show that evidence was suppressed, favorable, and material.[4] *See Ex parte Lalonde,* 570 S.W.3d 716, 724 (Tex. Crim. App. 2019). Even if we assume that there are new scientific developments in fingerprint identification that were not earlier ascertainable through the exercise of reasonable diligence, Applicant's Article 11.073 claim fails because he cannot show that "had the scientific evidence been presented at trial, on the preponderance of the evidence [he] would not have been convicted." Art. 11.073(b)(1) & (2). Applicant's challenge to the State's "cell-tower" testimony also fails because he has not met his burden to demonstrate that this evidence was both false and material. *See Weinstein,* 421 S.W.3d at 665. Based upon our own review, we deny relief on Claims One through Four and the remanded portion of Claim Six.

In Claim Five, Applicant argues that the "prosecutor failed to disclose critical exculpatory evidence regarding the fingerprint testimony in [his] case which, coupled with all other disclosure violations committed by the prosecution in his case, affected the outcome

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[4] This includes the *Brady* allegations raised in Applicant's "Supplemental Facts and Exhibits in Support of Application for a Writ of Habeas Corpus" that we received on October 3, 2017.

of his trial" and violated his constitutional rights. In the remaining portion of Claim Six, Applicant asserts that State's witness Belinda Owens falsely testified that she had produced all cell phone records related to State's witness Xenis Prudencio. With regard to these claims, we find that Applicant has failed to satisfy the requirements of Article 11.071, § 5(a). Accordingly, we dismiss these claims as an abuse of the writ without reviewing the merits of these claims.

IT IS SO ORDERED THIS THE 26th DAY OF JANUARY, 2022.

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